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Paper No. 9
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Robbins Industries, Inc.

Serial No. 75/635,291

Gregor N. Neff of Kramer Levin Naftalis & Frankel LLP for
Robbins Industries, Inc.

Catherine K. Krebs, Trademark Examining Attorney, Law
Office 108 (David Shallant, Managing Attorney).

Before Hohein, Chapman and Wendel, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

On February 5, 1999, Robbins Industries, Inc. filed an
application to register the mark VEGGIE VISE on the
Principal Register for "cutting boards" in International
Class 21. Applicant asserted a bona fide intention to use
the mark in commerce.

The Examining Attorney has finally refused
registration under Section 2(e)(1) of the Trademark Act, 15
U.S.C. §1052(e)(1), on the basis that the mark VEGGIE VISE,
when applied to the identified goods of the applicant, is
merely descriptive of them.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs. Applicant did not request an oral hearing.

The Examining Attorney contends that the mark VEGGIE VISE "describes a feature of the goods: a device for holding vegetables [or meats or fruits] in place while they are being cut on the cutting board" (brief, p. 3); that the term "veggie" is a recognized synonym for "vegetable" and a "vise" is a clamping tool; that VEGGIE VISE has a commonly understood meaning as applied to cutting boards which incorporate a means for holding the food in place while it is cut; and that the mark is not a coined term creating a unique commercial impression, as argued by applicant.

In support of her refusal to register under Section 2(e)(1), the Examining Attorney submitted the following materials: (i) dictionary definitions of the words "veggie" and "vise" and "incongruous"¹; (ii) a few third-party registrations which included disclaimers of the words "veggie" or "vise"; and (iii) two stories of 23 total stories found from a search [framed as "vise and (cutting board)"] of the Nexis database.

¹ The Examining Attorney's request that the Board take judicial notice of the definition of "incongruous" is granted. See TBMP §712.01.

Applicant contends that the product it is developing "will not have a vise of any kind, nor will it have anything which reasonably could be called a vise," but rather "it will have multiple tines or prongs" to hold the food item in place on the cutting board (December 2, 1999 response to Office action, p. 2); that applicant's product will not squeeze or clamp the food item, but will hold the food item by impaling it in the manner that a table fork holds food; that the mark is alliterative; and that the mark is whimsical and incongruous because purchasers would easily understand that the powerful jaws of a vise would crush vegetables and other food items. Applicant concludes that based on the alliterative, whimsical and incongruous nature of the mark, these common terms, viewed together as a whole, create a unique commercial impression resulting in a suggestive mark, citing *In re Shutts*, 217 USPQ 363 (TTAB 1983) (*SNO-RAKE* held not merely descriptive for a snow removal hand tool). Finally, applicant contends that the Nexis evidence submitted by the Examining Attorney refers to a vise and/or spikes on cutting boards thereby establishing that the "spikes" hold the food item and the "vise" holds a bowl; and that there are numerous other terms (e.g., clamp, spike) which competitors may use to refer to cutting boards with prongs.

It is well settled that "a term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods [or services]." (Emphasis added). In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). Moreover, the immediate idea must be conveyed with a "degree of particularity." In re TMS Corporation of the Americas, 200 USPQ 57, 59 (TTAB 1978); and In re Entenmann's Inc., 15 USPQ2d 1750, 1751 (TTAB 1990), aff'd, unpub'd, Fed. Cir. February 13, 1991. As the Court stated in In re Abcor Development, supra: "Although a mark may be generally descriptive, if it also functions as an indication of origin, it is not 'merely descriptive.'" See also, In re Quik-Print Copy Shop, Inc., 616 F.2d 523, 205 USPQ2d 505 (CCPA 1980).

Of course, whether a term or phrase is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term or phrase would have to the average purchaser of the goods or services because of the manner of its use. See In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). See also, In re Consolidated Cigar Co.,

35 USPQ2d 1290 (TTAB 1995); and In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991).

Viewing this record in its entirety, we find that the mark VEGGIE VISE, taken as a whole, is not merely descriptive of applicant's cutting boards. That is, the evidence of record does not establish that this mark, VEGGIE VISE, conveys an immediate idea of a primary feature of applicant's goods. The term "vise" in relation to holding food products (including vegetables) on a cutting board is whimsical and incongruous. It would be rare, if not completely illogical, for someone to suggest holding vegetables (or other food products) in a vise. Hence, the mark VEGGIE VISE consists of two terms which, when combined, result in an incongruous meaning. Applicant's mark is indeed a juxtaposition of two common words which, when viewed as a whole, and in relation to the involved goods (cutting boards), is creative, and thus the mark has not been shown to be merely descriptive.

The two Nexis stories submitted by the Examining Attorney (both relating to kitchen tools made to assist people with mild physical impairments or disabilities) are unpersuasive for the reasons asserted by applicant, as set forth above. Moreover, we note that the Examining Attorney did not submit any evidence demonstrating that the

combination of terms "VEGGIE VISE" has been used in a descriptive sense.

Finally, it has long been acknowledged that there is often a very narrow line between terms which are merely descriptive and those which are suggestive, and the borderline between the two is hardly a clear one. See *In re Atavio Inc.*, 25 USPQ2d 1361 (TTAB 1992). At the very least, if doubt exists as to whether a term is merely descriptive, it is the practice of this Board to resolve that doubt in favor of the applicant and pass the application to publication. See *In re Gourmet Bakers Inc.*, 173 USPQ 565 (TTAB 1972). In this way, anyone who believes that the mark is, in fact, descriptive, may oppose and present evidence on this issue to the Board.²

Decision: The refusal to register under Section 2(e)(1) is reversed.

² In addition, we note that while this application is based on applicant's assertion of a bona fide intention to use the mark in commerce, there is no evidence to show how applicant plans to use the involved mark. Specifically, there are no specimens of record, and applicant declined the Examining Attorney's request for a photograph or advertising showing applicant's goods based on applicant's continuing development of its product and possible patentability of certain features thereof. If applicant's specimens of use demonstrate descriptive use of this mark, the Examining Attorney may wish to re-examine the application with respect to this issue.